No. 86-1024

In the Supreme Court of the United States

OCTOBER TERM, 1986

CONFERENCE OF STATE BANK SUPERVISORS, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an institution that takes deposits but does not make commercial loans is a "bank" within the meaning of Section 3(d) of the Bank Holding Company Act, 12 U.S.C. 1842(d).

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 10a-29a, 46a-52a) are reported at 760 F.2d 1135 and 800 F.2d 1534, respectively. The order of the Board of Governors of the Federal Reserve System (Pet. App. 1a-9a) is reported at 70 Fed. Res. Bull. 371.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1986. The petition for a writ of certiorari was filed on December 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(c) of the Bank Holding Company Act of 1956 (BHCA or Act) (12 U.S.C. 1841(c)) defines "bank" to mean "any institution * * * which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." The term "bank holding company," in turn, is defined to "mean[] any company which has control over any bank" (12 U.S.C. 1841(a)(1)). The BHCA subjects such companies to extensive regulation. Among other things, Section 3(d) of the Act (12 U.S.C. 1842(d))—commonly known as the Douglas Amendment—prohibits a bank holding company that has its principal place of business in one state from acquiring a bank located in another state, unless the acquisition "is specifically authorized by the statute laws of the State in which such bank is located." In addition, Section 4 of the BHCA (12 U.S.C. 1843) generally prohibits bank holding companies from engaging in nonbanking activities, although Section 4(c)(8), 12 U.S.C. 1843(c)(8), permits such companies to conduct activities that are deemed by the Federal Reserve Board "to be so closely related to banking * * * as to be a proper incident thereto."

Respondent U.S. Trust Corporation (U.S. Trust) is a bank holding company located in New York. Since 1981, U.S. Trust has owned a nondepository

trust company subsidiary in Florida. In 1983, U.S. Trust sought the Board's approval, pursuant to Section 4(c)(8) of the BHCA, to expand its Florida subsidiary's "non-bank" activities to include the acceptance of demand deposits and the making of consumer—but not commercial—loans. The Board granted the application, explaining that since the subsidiary would not make commercial loans it would "not be a bank within the meaning of the Bank Holding Company Act" (Pet. App. 4a). For that reason, the Board continued, U.S. Trust's proposal did not run afoul of the Douglas Amendment: "In this situation, where the applicant will not make commercial loans in Florida * * * the Board does not have the discretion to find that the proposal falls within the prohibitions on interstate acquisitions contained in section 3(d) of the Act, which only applies to the acquisition of banks as defined in section 2(c) of the Act" (*ibid.* (citation omitted)).

Petitioners, who contested the U.S. Trust application before the Board, sought review of the Board's order in the court of appeals, arguing that the Florida subsidiary was subject to the Act's limitations on interstate banking despite its failure to satisfy the BHCA's two-part definition of a "bank." The court of appeals agreed (Pet. App. 10a-29a), eschewing "[l]iteralism in statutory interpretation" as, in this case, "contrary to an express purpose of the Act" (*id.* at 17a). The court first expressed its view that the commercial lending prong was added to the Act's definition of "bank" as a "technical amendment" that had been intended to affect only a single institution (*id.* at 24a). Against this background, the court concluded that a literal application of the definition would "destroy the important federal policy embodied

in the Douglas Amendment—a federal policy which allows the state to choose for itself whether to open its borders to out-of-state banks" (*id.* at 27a). The court therefore held that the Board should have denied the U.S. Trust application under Section 5(b) of the BHCA (12 U.S.C. 1844(b)), which authorizes Board action to "prevent evasions" of the Act (Pet. App. 27a-29a). U.S. Trust sought certiorari from this ruling.

2. While U.S. Trust's petition for certiorari was pending, this Court decided *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986). In *Dimension*, the Court invalidated a Board regulation that broadly defined the term "bank" for purposes of the BHCA. The regulation had read the "demand deposit" portion of the Section 2(c) definition of "bank" to include any deposit that is payable on demand as a matter of practice, even if not as a matter of legal right; it had also read Section 2(c)'s reference to "making commercial loans" to include the purchase of certain money market instruments. See slip op. 2 (citing 12 C.F.R. 225.2(a)(1) (1985)). The Court held that the regulation was inconsistent with the statutory definition of the term "bank" (slip op. 3-11). In particular, the Court rejected the contention that the "commercial loan" portion of the Section 2(c) definition had been intended to affect only one institution, holding that "[t]he statute by its terms * * * exempts from regulation [under the BHCA] *all* institutions that do not engage in the business of making commercial loans" (slip op. 9-10 (emphasis in original)).

The Court also rejected the argument that its reading of the statute was inconsistent with the purposes of the BHCA. The Court explained that "[t]he

'plain purpose' of legislation * * * is determined in the first instance with reference to the plain language of the statute itself" (slip op. 12). And the Court noted that, "[if] the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress" (*id.* at 13).

The Court subsequently granted U.S. Trust's petition for certiorari in this case, vacated the judgment of the court of appeals, and remanded the case for reconsideration in light of *Dimension* (Pet. App. 45a).

3. On remand, the court of appeals affirmed the Board's order (Pet. App. 46a-52a), explaining that *Dimension* "squarely rejects the reasoning behind [the] vacated opinion" (*id.* at 47a). The court of appeals found it "an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute. Thus, a depository institution which is not a bank as defined in § 1841(c) is similarly not a bank for purposes of the Douglas Amendment" (*id.* at 51a (citation omitted)). The court added that "[i]f, as *Dimension* holds, the Federal Reserve Board is without regulatory jurisdiction to regulate nonbank banks as 'banks' under the Act, then it is without regulatory jurisdiction to prevent the interstate proliferation of nonbank banks under the Douglas Amendment" (*ibid.*). While the court expressed concern that this result might frustrate the BHCA's purposes, it added that Congress has the responsibility to decide "whether it wishes to shepherd the nonbank banks inside the regulatory pale" (*id.* at 52a).

ARGUMENT

Petitioners appear to acknowledge that U.S. Trust's Florida subsidiary is not a "bank" within the meaning of Section 2(c) of the Act, the BHCA's definitional provision. Given this Court's holding in *Board of Governors* v. *Dimension Financial Corp., supra*, petitioners could hardly contend otherwise. They argue, however, that the statutory definition of "bank" does not govern the use of that term in the Douglas Amendment; instead, they maintain that the Douglas Amendment's restriction on the interstate acquisition of "additional bank[s]" by bank holding companies is applicable even to deposit-taking institutions that do not make commercial loans and that, therefore, are not "banks" as defined in Section 2(c) of the Act. This contention, which has now been addressed (and rejected) only by a single court of appeals, is entirely without merit and does not warrant this Court's consideration.

1. When Congress defines a statutory term with precision, it generally is presumed that the definition controls the meaning of the term wherever it appears in the statute. See generally *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 13-15; *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979); *Atlantic Cleaners & Dryers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). Here, Section 2(c) of the BHCA provides without limitation that " '[b]ank' means any institution" that accepts demand deposits and makes commercial loans. By putting the definition in this form and by placing it at the beginning of 12 U.S.C. Chapter 17 (which includes the BHCA), Congress plainly intended Section 2(c)'s definition to control throughout the BHCA, so that all of the Act's limitations on the ownership and acquisition of banks

apply only to institutions that meet Section 2(c)'s two-pronged test. And as petitioners obliquely acknowledge (see Pet. 16-19), there is no indication in the legislative history of the BHCA that Congress intended a different, unwritten definition to apply to the term "bank" as it appears in the Douglas Amendment.[1]

The statutory structure confirms that the Section 2(c) definition of "bank" must apply to the use of that term in Section 3(d). Section 3(a) of the Act (12 U.S.C. 1842(a)) requires Board approval prior to the acquisition of a "bank." Section 3(d)—the Douglas Amendment—operates by prohibiting the Board from approving an interstate acquisition of a "bank" unless the acquisition is authorized by state statute. Thus, the Douglas Amendment's restrictions on interstate banking apply only to the acquisition of

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[1] Petitioners cite a number of cases (Pet. 9-11) for the unsurprising proposition that the same term may be given different meanings in different portions of a statute if that plainly is Congress's intent. In each of the cases cited by petitioners, however, there were compelling indications in the statutory background that Congress intended such a reading of the statute. See, *e.g.*, *Cass* v. *United States*, 417 U.S. 72, 76-84 (1974); *Atlantic Cleaners & Dryers*, 286 U.S. at 435. There is no such evidence here. Petitioners attempt to put the best face on this lack of support for their contentions, stating that "there is no evidence to suggest that Congress intended the Douglas Amendment to be affected in any way by the 1970 amendment to Section 2(c) [which added the commercial lending prong to the definition of 'bank']" (Pet. 18 (footnote omitted)). But since the Douglas Amendment was part of the BHCA when the definition was modified and the definition appears on its face to apply to the entire BHCA, it surely is petitioners' obligation to offer specific evidence that Congress wanted to limit the applicability of the provision.

"banks" for which the Board's prior approval is required under Section 3(a); the interstate acquisition of nonbanking entities, which is governed by Section 4, is not subject to the Douglas Amendment's restrictions. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980). In these circumstances, it would be nonsensical to give the term "bank" different meanings in Section 3(a) and (d).

2. Even if it were somehow reconcilable with the statutory language, petitioners' reading of the BHCA is foreclosed by *Dimension*. The Board regulation at issue in that case provided a definition of "bank" that applied to all portions of the BHCA, including the Douglas Amendment. The Board's analysis was thus premised on the understanding that the definition of "bank" in Section 2(c) dictates the meaning of that term wherever it appears in any of the BHCA's provisions. Indeed, in promulgating the regulation the Board explained that its interpretation of "bank" was intended to preserve, among other things, the ban on interstate bank acquisitions imposed by the Douglas Amendment (49 Fed. Reg. 836 (1984)); the interstate effects of a decision setting aside the regulation were stressed by the Board in its brief to this Court in *Dimension* (84-1274 Pet. Br. 12, 24), and the Board's concerns were acknowledged by this Court in its decision (slip op. 5). The Court, however, made no suggestion that the Board has greater authority to regulate the acquisition of "nonbank banks" by bank holding companies under the Douglas Amendment than it has under other provisions of the BHCA. To the contrary, the Court stated flatly that institutions that do not engage in commercial lending (and are therefore not "banks" within

the meaning of Section 2(c)) are "exempt from regulation" under the Act (slip op. 9).[2]

Petitioners have offered no reason for the court to revisit this issue. They contend principally (Pet. 6-8) that the decision below is inconsistent with the policy against interstate banking that they believe to underlie the BHCA; they also assert (Pet. 18-19) that a 1970 amendment of Section 2(c), which added the "commercial loan" prong to the definition of "bank" (see Pub. L. No. 91-607, § 101(c), 84 Stat. 1762), was intended to exclude only a single institution from regulation under the Act. The Court, however, expressly rejected identical contentions in *Dimension*. See slip op. 9-10, 12.[3] That is enough to dispose of petitioners' claims.

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[2] Petitioners attempt to distinguish *Dimension* by arguing that their reading of the Act would bring the Douglas Amendment into play only when a "nonbank bank"—an institution that is outside the Section 2(c) definition because it either does not offer demand deposits or does not make commercial loans—is acquired by a bank holding company that is already subject to regulation by the Board; in contrast, petitioners continue, the Board regulation at issue in *Dimension* would have converted any company that owned a nonbank bank into a bank holding company (if that nonbank bank fell within the Board's regulatory definition of "bank") (Pet. 11-13). While this is true, it is entirely beside the point. The Court's decision in *Dimension* turned on its reading of Section 2(c), not on the regulated (or unregulated) status of the entities affected by the Board's regulation. Indeed, petitioners' reading would create an irrational distinction by permitting institutions that are not bank holding companies to, in petitioners' words, "acquire deposit-taking banks across state lines" (Pet. 6); it would prevent bank holding companies from doing the same thing.

[3] Petitioners place great weight on the fact that the 1970 amendment's legislative history does not expressly mention

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the Douglas Amendment (Pet. 18-19). In fact, however, the legislative history does not expressly mention *any* provision of the BHCA; it simply speaks generally of "exclud[ing] institutions that are not engaged in the business of making commercial loans from the definition of bank." S. Rep. 91-1084, 91st Cong., 2d Sess. 24 (1970).

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